

EMPLOYMENT LAW COMPLIANCE BILL 2008

Speech by

**Mr Billy Kelleher T.D., Minister for Labour Affairs
at the Department of Enterprise, Trade and
Employment,**

on Second Stage of Bill

in Dáil Éireann on

5 February, 2009

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Affairs, on the Second Stage of the Employment Law
Compliance Bill 2008 in Dáil Éireann on 5 February 2009.**

Molaim:

“Go léifear an Bille don Dara Uair”.

Is Bille tábhachtach é seo chun comhlíonadh feabhsaithe na reachtaíochta fostaíochta a áirithiú, mar atá aontaithe ag na páirtithe sa Chomhaontú Comhpháirtíochta Sóisialta Deich mBliana i dTreo 2016.

I measc forálachta an Bhille -

- Tá Stiúrthóir an Údaráis Náisiúnta um Chearta Fostaíochta á chur ar bhonn reachtúil,
- Tá socrú á dhéanamh maidir le bord comhairleach don Stiúrthóir agus do mhíniú a fheidhmeanna;

- Tá socrú breise á dhéanamh maidir le reachtaíocht fostaíochta a fhorfheidhmiú lena n-áirítear trí oifigigh údaraithe a cheapadh le chumhachtaí leathna mar is gá, agus mhéadú na bpionós mar gheall ar chionta áirithe faoin reachtaíocht fostaíochta agus faoi achtacháin áirithe eile.

Social Partnership

For over two decades the social partnership process has served Ireland exceptionally well by playing a pivotal role in our economic and social development. This has been reflected in the ongoing engagement of Government with the Social Partners in the development of legislative and regulatory frameworks.

Insofar as the economy and employment are concerned, a particular focus has been on improving the employability and adaptability of employees, both before and during their working life. The changes in the Irish labour market arising through increased access by workers from new EU Member States are also being addressed and we need to ensure that social

partnership, which has underpinned the economic and social progress we have achieved, continues to play a positive role in meeting the challenges the economy now faces.

Employment Rights legislation has also played an important role in promoting labour market stability and while “TOWARDS 2016” recognises the broad level of compliance with employment rights across the economy generally, it nevertheless sets out a significant shared commitment by the parties towards securing better compliance with legal requirements underpinned by adequate enforcement.

A fundamental objective of “TOWARDS 2016” is to enhance the effectiveness of, and public confidence in, the laws governing employment rights. The Bill delivers on this goal. Furthermore, the National Employment Rights Authority - NERA - which was established on an interim basis with the priority objective of securing increased public confidence in the

system of compliance with employment rights legislation, has been making steady and substantial progress.

Objectives of the Bill

As the Bill was published with a detailed Explanatory and Financial Memorandum it is not necessary for me to explain every section in detail at this Stage. The main provisions of the Bill include –

- the establishment of NERA on a statutory basis with a tripartite Advisory Board;
- the strengthening of the inspection and enforcement powers of NERA together with provisions designed to secure compliance, including the protection of employees against penalisation for claiming their entitlements or “whistleblowing”, such as reporting breaches of employment legislation to NERA;

- specifying the statutory employment records to be kept by employers for all employees and the high penalties for failure to keep these records as well as for other breaches of employment legislation;
- the fostering of increased co-operation at workplace level so as to safeguard employment rights;
- provision for exchanges of information between statutory enforcement authorities to facilitate Joint Investigations where breaches of the law are suspected;
- strengthening of the powers of the Minister for Enterprise, Trade and Employment to initiate investigations – such as happened in the GAMA case – and to publish the outcomes in cases of public interest; and
- the involvement of labour inspectors, for the first time, in the enforcement of provisions of the Employment Permits Acts

and the strengthening of those Acts as regards records and other obligations of employers.

Compliance Focus

The agreement reached by the Social Partners to establish NERA on a statutory footing follows on from the successful establishment of the Office of the Director of Corporate Enforcement in 2001. The mission of the ODCE is “to improve the compliance environment for corporate activity in the Irish economy”. The Employment Law Compliance Bill is similarly focused on securing a culture of compliance.

At the heart of the Bill is the intention that all employees, but particularly low-paid and other vulnerable groups, can have their rights and entitlements pursued and vindicated by a dedicated State labour inspectorate. Equally, the Bill is intended to ensure that responsible employers, the vast majority of whom proactively give their employees their full entitlements, will not be faced with unfair competition from less scrupulous

competitors who are willing to gain competitive advantage by short-changing employees. The distortion of competition in the market through non-compliance with employment law is an issue that is often overlooked.

I fully appreciate that the economic climate has changed dramatically since the inception of this Bill with economy and value for money considerations now to the forefront. Ireland faces very significant economic and fiscal challenges which were not foreseen at the outset of “TOWARDS 2016”. However, arising from this Government's recovery plan, the Irish economy can be strong and dynamic again provided we take the right decisions during this difficult period. In this regard, it is important to remember that NERA does not make the law – it simply enforces it just as An Garda Síochána enforce the criminal code and Revenue Inspectors invigilate tax laws.

I do not expect that the Bill will generate significant costs for employers who comply with employment legislation. In fact,

the Bill's provision for exchange of employment information between statutory enforcement authorities will reduce the need for separate and time-consuming approaches to employers by those authorities. The Government is also committed, in the "Smart Economy" action plan, to a consolidated inspection programme whereby there would be a streamlined approach by the different inspectorates that visit workplaces including Health & Safety, Social Welfare, etc.

NERA

Before dealing with the Bill's provisions in more detail, I will update the House on the activities of NERA since operations began in February 2007.

NERA was established on an interim basis following the social partnership agreement "Towards 2016" and against a backdrop of much disquiet about the inadequacy of enforcement of employment law standards. Deputies in this House will remember the many Parliamentary Questions and Debates at

that time where the Government was condemned for having “more dog wardens than labour inspectors”. That has now changed.

Since its establishment in February 2007, NERA has been very active in organising information and awareness campaigns at employers and employees designed to bring about a stronger culture of employment compliance. The information and awareness role played by NERA is important in that this is a necessary precursor to the function of inspection and ultimately enforcement in order to give the necessary time and space for employers to come into compliance.

The organisation has delivered on providing regional cover with offices in Carlow, Dublin, Cork, Sligo and Shannon which has enabled it to operate throughout the country using the existing powers available under existing employment law compliance legislation. NERA is now well equipped to perform all of the functions and exercise the strengthened powers provided for in

the Employment Law Compliance Bill when enacted. In particular, I am anxious that upon enactment of the Bill, NERA will become more involved in the enforcement role provided for under Employment Permits legislation. Indeed, I recently wrote to NERA asking them to put in place a focused campaign to ensure that the arrangements prohibiting employment of Bulgarian and Romanian nationals are being adhered to.

Structure of the Bill

The Bill, as a whole, will come into operation one month after the President signs it into law. This dispenses with the need for a Commencement Order to be made by the Minister. One month's "grace" is the minimum needed to allow employers and their advisers to gear themselves so as not to commit any of the new criminal offences created by the Bill, for example as regards the new requirements in relation to keeping employment records or the non-supply of information requested by authorised officers. However, I am open to the views of the Deputies as to whether this "grace" period should be extended

somewhat to allow adequate time to adjust to new arrangements and responsibilities.

Provisions for the establishment, on a statutory basis, of NERA and a tripartite Advisory Board are set out in Part 2 of the Bill. The terms and conditions of appointment of the Director are detailed and a limit of 10 years is placed on such appointment. Provision is also made to guard against any conflict of interests arising in the 12 months following the cessation of the Director's appointment and for the resignation, suspension, removal and disqualification of the Director. The Director's functions are comprehensively set out, as are provisions for the delegation of functions to the Director's staff. These provisions follow standard practice for such appointments.

Section 28 permits extensive cooperation between NERA and other statutory enforcement authorities so as to enable the Director to detect and deal effectively with breaches of employment legislation.

Section 29 enables the Director and other statutory enforcement authorities to advise each other of suspected offences under their respective remits, which come to their notice.

The core issue of compliance is addressed at Part 3. Employers will be required to display notices in or at their workplaces advising employees of their entitlements under employment legislation and how to seek redress for the denial of such entitlements. Contact information for NERA must also be displayed. I propose to amend the Bill to require NERA to supply these notices in appropriate languages and to make it clear that the notices may be displayed by electronic or other means or both.

In tandem with NERA's mission to achieve a national culture of employment rights compliance, Section 33 of the Bill highlights the first principle of compliance, namely, that employers and employees should, themselves, endeavour to resolve disputes or

differences at workplace level where possible. This principle is key to good workplace relations and good business and is specifically highlighted in “TOWARDS 2016” for that reason. Employees and employers should actively engage in that process in a timely way. This principle will be developed further in amendments which I hope to propose at Dáil Committee Stage to Section 33, along with refinements to existing employment legislation which I will be making by way of additions to Schedule 5 to the Bill.

Section 33 also obliges the Director of NERA to provide authoritative information on request to employees or employers to enable them, as far as possible, to resolve their disputes or differences at workplace level. In order to be able to do this, and also in the general context of effectively promoting compliance with employment legislation, the Director of NERA will need to keep up-to-date with decisions of Rights Commissioners and determinations of the Employment Appeals

Tribunal and the Labour Court, as well as with rulings of the Irish Courts and the European Court of Justice.

The key area of enforcement is addressed at Part 4 of the Bill. It specifically empowers the Director of NERA to formally appoint authorised officers, and offences are created where anyone obstructs, impedes, assaults or impersonates an authorised officer. Provision is made for right of entry, inspection, examination and investigation by authorised officers who may seek a court order for the production of evidential material if necessary. I expect, and I am assured through ongoing contacts with the Director of NERA, that these powers will be used judiciously and appropriately at all times.

Section 38 empowers the Director to require specific persons to give information or produce documents and Section 39 makes it an offence for any person to falsify, conceal, destroy or dispose of any relevant record so as to thwart an investigation by the Director of a suspected offence.

Section 41 provides a necessary power for the Minister for Enterprise, Trade and Employment, in the public interest, to require the Director to undertake an investigation of a particular employment or particular classes of employments in relation to which the Minister reasonably believes there is a serious risk of non-compliance with the law.

Section 47 of the Bill is designed to secure prompt payment of moneys owing to employees under employment legislation. It empowers the Director of NERA or an authorised officer to issue a Compliance Notice requiring an employer to pay any moneys believed to be owing to any employee under employment legislation. The employer concerned is entitled to challenge such a Compliance Notice directly or to appeal against the Director's decision to the District Court.

Section 49 provides for Enforcement Orders which may be needed to deal with urgent and significant cases of non-

compliance with employment legislation. It empowers the Director to apply to the High Court for an Order requiring the employer concerned to comply with the relevant provision. Again, this is a function which NERA will use judiciously and only when absolutely necessary.

Part 5 of the Bill both strengthens the obligations of employers and the rights of employees. In particular, Section 50 provides immunity for any persons who in good faith report breaches of employment legislation to NERA, the Minister for Enterprise, Trade and Employment or to the Garda Síochána. As a corollary, it will be a serious offence for anyone to report in bad faith.

Section 51, with Schedule 2, provides comprehensive protection for employees against penalisation by their employers for reporting breaches of employment legislation in good faith, whether by their employer or by another employer, or for

seeking their entitlements or exercising rights, or for giving evidence in Court proceedings relating to such breaches.

Section 52 makes comprehensive provision for statutory employment records to be kept and maintained by employers.

Where there is failure to keep such records, the onus will be on the employer or other person concerned to prove in Court proceedings that the relevant provision of employment legislation was complied with as regards the employees concerned.

Penalties

Despite our best efforts at promoting compliance with the law, there may still be some temptation for non-compliance. As a deterrent, the Bill provides considerable penalties both for new offences and existing ones, in line with “TOWARDS 2016”. For the most serious of the new offences, the maximum penalty on summary conviction will amount to a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months, or

both. On conviction on indictment, a maximum fine of €250,000 is available and/or 3 years' imprisonment. These are maximum penalties. It will be for the Courts to decide on the actual penalty to impose on conviction in any specific case.

Amendments

As Deputies will have noticed, Schedule 5 to the Bill does not yet provide for consequential and other amendments required to over 30 separate enactments which come within the definition of “employment legislation”. Those amendments, together with further refinements needed to the Employment Permits Acts, will be included in the full set of amendments to the Bill which I hope to table for Committee Stage consideration.

Those amendments will include substantial changes to the body of the Bill, to reflect the outcome of detailed consultations with the Social Partners and stakeholders, as well as of further detailed examination of the Bill with Parliamentary Counsel and the Office of the Attorney General.

The amendments will include –

- Removing some offences from the category of "criminal offences" and deletion of Section 61 (fixed-payment notices), so as to make enforcement more proportionate on employers;
- Strengthening the role of the tripartite Advisory Board, by requiring the Director of NERA to have regard to advice provided by the Advisory Board on any issue and, in particular in relation to NERA's work programme and strategy statement;
- Clarifying the workplace notice requirements of employers by requiring them to display notices according to templates provided by NERA;
- Highlighting the need for employees and employers to endeavour to promptly resolve disputes or differences at

workplace level, but without prejudice to employees' statutory entitlements or any NERA investigations or other enforcement activity which may be needed;

- Clarifying that persons appearing before the Director of NERA can also be accompanied by a trade union representative or an employer's organisation representative, as appropriate, as well as by a legal representative;
- Making clear provision that certain key employment records will be readily available in the State for NERA to examine if necessary;
- Reducing the burden on employers on cessation of employees' employment by limiting their obligation to produce a Statement of Employment on a request basis only;

- Prohibiting the retention by employers of personal documents or other property of employees;
- Amending Schedule 5 of the Bill so as to require employers to keep a copy of any employment permit granted to any of their employees, rather than a copy of every employee's passport or other identity document, which would be unnecessarily burdensome. As I understand it, it is already an offence under other legislation to unlawfully retain anyone's passport. The opportunity will also be taken to clarify provisions of the Employment Permits Acts to assist their operation and enforcement;

Extent of changes

The Bill does not change current statutory arrangements relating to the roles of the various Employment Rights Adjudication Bodies - the Rights Commissioners, the Labour Relations Commission, the Employment Appeals Tribunal and the Labour

Court - which have a key role in ensuring that disputes concerning employees' rights are resolved as efficiently and as effectively as possible. While there may be a case for improving and streamlining these bodies, it would be my intention to develop any proposals in this regard separately and in the light of ongoing Government deliberations in relation to agency rationalisation and efficiency reviews.

I should also emphasise that the Bill does not amend employment law which currently exists in the context of the minimum wage, holiday entitlements, Employment Regulation Orders and Registered Employment Agreements. Employers are obliged to comply with existing laws and the issue of NERA inspections does not impose any additional regulatory burden.

This is an important point. The industrial relations framework that has evolved since the foundation of the State is essentially voluntarist in nature. Many of the mechanisms for regulating industrial relations are tri-partite in nature, including the Labour

Court and other employment rights bodies. This approach has been strengthened in recent years by the development of strong Social Partnership structures. In practical terms, this means that the State has been prepared to leave the regulation of many issues to employers and workers, including minimum wages and terms and conditions in certain sectors of the economy.

An example of this approach is the process by which minimum rates of pay are agreed through Joint Labour Committees and made through Registered Employment Agreements and Employment Regulation Orders, for example in the hotels and catering sectors. In these cases, neither I as Minister or NERA as the enforcement agency have any role in the setting of the wage rates and other terms. Employers and workers themselves can only do this and this arrangement has existed since the late 1940's.

It is a good arrangement and one which supports the voluntarist system of industrial relations and does not unnecessarily involve

the State in regulating areas of the economy where agreement can be reached by workers and employers alike. As with all powers, there are accompanying responsibilities. In these challenging times, it is more important than ever that both employers and workers who participate on Joint Labour Committees are responsive to prevailing circumstances and the impact that appropriate terms and conditions can have on the ongoing viability of businesses and the protection of employment levels.

There have been some encouraging signals that this is the case recently with a preliminary agreement by the employer and trade union interests in the catering sector to fix a uniform set of terms and conditions (including minimum pay rates and Sunday premium rates) for application throughout the country. It is in nobody's interests if there is an aversion to respond to changing circumstances. Social Partnership has always proved itself adaptable in the past and, notwithstanding current difficulties at national level, I am confident that it can continue to renew itself

and respond to the emerging challenges that face us all as an economy and a society.

In conclusion, this Bill is fundamentally about employment rights, protecting workers, and ensuring that they get what they are entitled to under statutory provisions.

I will be happy to expand on any of the foregoing and answer any questions Deputies may have in relation to this Bill.

I commend the Bill to the House.

ENDS